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Attorneys for Plaintiffs Enoch Adams, Jr., Leroy Adams, Andrew Koenig, Jerry Norton, David Swan and Joseph Swan

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA AT ANCHORAGE**

ENOCH ADAMS, JR., LEROY ADAMS,
ANDREW KOENIG, JERRY NORTON
DAVID SWAN and JOSEPH SWAN,

Case No. A04-49 (JWS)

Plaintiffs.

V.

TECK COMINCO ALASKA INCORPORATED
Defendant.

DECLARATION OF LUKE COLE
IN SUPPORT OF PLAINTIFFS'
REPLY IN SUPPORT
OF OBJECTIONS TO
NORTHWEST ARCTIC
BOROUGH'S UNDISCLOSED
WITNESS AND MOTION *IN
LIMINE* TO EXCLUDE
WITNESS NOT
TIMELY DISCLOSED
(Fed. R. Civ. Proc. 26 and 37)

NANA REGIONAL CORPORATION and
NORTHWEST ARCTIC BOROUGH,
Intervenors-Defendants.

1 I, Luke W. Cole, declare:

2 1. I am over 21 years of age and not a party to this action. I am lead counsel for
3 plaintiffs.

4 2. Adams moved to exclude the Borough's witness because it is harmed by the
5 Borough's failure to timely disclose her identity. First, the failure to disclose the witness during
6 the discovery period precluded Adams from doing any written discovery of the Borough about
7 the witness and her testimony, such as requests for admission, requests for production, or
8 interrogatories to discover the underlying facts that would inform her testimony.

9 3. Second, the failure to disclose the witness during the discovery period precluded
10 Adams from deposing her or other Borough officials (or any other witness, for that matter) about
11 her testimony.

12 4. Third, the failure to disclose the witness during the discovery period precluded Adams
13 from listing any documents as exhibits it might have discovered from the Borough that would
14 contradict, supplement, explain or undercut her testimony.

15 5. Finally, the failure to disclose the identity of the witness during the discovery period
16 precluded Adams from securing and timely disclosing any witness(es) it might have chosen to
17 use to rebut the witness's testimony.

18 6. Because the discovery period is now long over, none of these harms are curable. It
19 would be impossible for Adams to do written discovery of the Borough, and then depositions
20 following that, followed up by further written discovery, as it has had the opportunity to do with
21 Teck Cominco in this case.

22 7. The email exchange quoted by the Borough was not about testimony at trial, it was
23 about which facts all parties were willing to stipulate to, and counsel for plaintiffs was objecting
24 on relevance grounds to the inclusion of some of the facts proposed by NAB. My mention of
25 testimony in this email exchange was not in any way a waiver of Adams's right to challenge
26 defendants' witnesses, as it has subsequently done.

27 8. Because the facts in question were stipulated facts that had to be agreed to by *all*
28 parties before they could be included, the Borough could not "contest" their exclusion by any

1 party. The Borough's facts were not going to be included, period, because Adams had already
2 objected to them as irrelevant.

3 9. My position on the Borough's witness has been consistent from the KRPC case to this
4 one: I supported the Borough filing a witness list and allowing those disclosed witnesses to
5 testify at trial in the KRPC suit, should the Borough be allowed to intervene and I opposed the
6 Borough's late disclosed witness here because the Borough did not file a witness list in this case.

7 10. Plaintiffs expert Randolph Fischer is testifying by deposition because, as an elected
8 member of the Colorado legislature, his schedule precludes him being in Alaska for trial this
9 summer. Because he was timely disclosed as a witness, and timely filed an expert report, all
10 parties (including the Borough) deposed Mr. Fischer in 2005. Because he was timely disclosed
11 as a witness, Teck Cominco had the opportunity to propound extensive discovery to Adams
12 concerning Mr. Fischer's testimony in 2005, and Adams provided extensive responses to that
13 discovery in 2005. Mr. Fischer also timely updated his expert report in January 2008.

14 I declare under penalty of perjury that the foregoing is true and correct. Executed this 28th
15 day of February at San Francisco, California.

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17 /s/ Luke Cole
18 Luke Cole
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1 CERTIFICATE OF SERVICE

2 I hereby certify that on the 28th day of February 2008, a true and correct copy of the foregoing Declaration of Luke Cole in
3 Support of Reply in Support of Objections to Northwest Arctic Borough's Witness List and Motion to Exclude Undisclosed
4 Witness was served, via electronic mail, on the below identified parties of record:

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25 _____
26 /S/ Luke Cole
27

28 Luke Cole